UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SONIA LEE NETTLES,

Plaintiff,

v.

FARMERS INSURANCE EXCHANGE and FARMERS GROUP, INC.,

Defendants.

Case No. C06-5164RJB

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the court on Defendants' Motion for Summary Judgment. Dkt. 20. The court has considered the pleadings filed in support of and in opposition to the motion and the file herein. The court has determined that the issues can be reviewed on the record and that oral argument is not necessary.

PROCEDURAL HISTORY AND RELEVANT FACTS

Employment History. Plaintiff Sonia Lee Nettles is a black woman of Jamaican descent who was born on December 11, 1960. On January 3, 1983, plaintiff was hired by defendant Farmers Group, Inc. (Farmers Group) as a File Clerk. During the course of her employment with Farmers Group, Ms. Nettles was promoted to several other clerical positions.

On May 1, 1998, plaintiff became a Claims Processor at the Portland North branch claims office (Portland BCO), one of Farmers Insurance Exchange's branch claims offices in Portland, Oregon. Defendant contends that, as a claims employee, plaintiff was employed by Farmers Insurance Exchange. In March of 1999, plaintiff was promoted to Claims Customer Service Clerk. Her job functions included receptionist duties, such as greeting and talking with customers in the drive-in area; and clerical duties involved in the processing of auto claims, such as contacting the insured, locating the damaged vehicle, and assigning the claim to the adjuster.

In 2000, Farmers Insurance Exchange announced that in 2001, it would shut down the Portland BCO. Ed Mansell, who had been the manager of the Portland BCO, became the manager of the Vancouver, Washington branch claims office (Vancouver BCO) in the Fall of 2000. Carrie White, who had been a clerical employee at the Portland BCO, became the clerical supervisor at the Vancouver BCO in late 2000. Shortly thereafter, plaintiff applied for an open clerical position at the Vancouver BCO. Ms. White interviewed the candidates and recommended to Mr. Mansell that they select plaintiff for the position. At the time plaintiff was selected for the clerical position at the Vancouver BCO, Mr. Mansell and Ms. White knew that she was black and from Jamaica.

Plaintiff's Performance Reviews. On November 19, 1998, plaintiff had a performance review, signed by Pam Babcock as her supervisor and Ed Mansell as the next level manager. Dkt. 21-3, at 1. This performance review noted that plaintiff had "a very good forthright attitude with your co-workers and myself. This is appreciated, as we are able to communicate well together." *Id*. The review further noted that plaintiff had "met immediate expectations for your job duties as we discussed in a meeting regarding advancements," and that she would "need to further increase your knowledge in the Drive-In and have less errors in spotting vehicles." *Id.* In his deposition in this case, however, Mr. Mansell stated that he had concerns about plaintiff getting along with other employees and managing personal problems, including telephone calls. Dkt. 57-2, at 6-7.

Plaintiff's performance review of October, 1999 (signed by Ms. Babcock and Mr. Mansell); December, 2000 (signed by Ms. Babcock and Mr. Mansell); and December, 2001 (signed by Ms. White and Mr. Mansell) assessed her as "meets expectations" in the areas assessed, but none of the evaluations noted concerns about plaintiff getting along with other employees or managing personal problems. Dkt. 21-3, at 3-15. In his deposition, Mr. Mansell stated that plaintiff continued to have problems with personal telephone calls and managing personal issues in the workplace. Dkt. 57-2, at 18.

Plaintiff's Complaint to Supervisors. In 2001, plaintiff complained to Ms. White about the behavior of one of her clerical coworkers, Pat Reudink. Ms. White informed Mr. Mansell of plaintiff's complaint. Plaintiff stated in her deposition that she told Mr. Mansell and Ms. White about "how she [Ms. Reudink] was treating and that she's treating me different–from the others [sic] employee." Dkt. 21-2, at 17, pp. 80-81 of plaintiff's deposition. Plaintiff further testified as follows:

> Q. So specifically what did you tell them? Did you tell them that she yelled at you?
>
> A. Well, I – I tell her the way she talks to me, she embarrass me in front of customers, you know. And, basically, when I talk to – when I have to – when I have to go to her for any work related she – I mean, she basically makes me – I mean, I was – when I have to go to Pat to talk to her about anything related to work, I get – I was very nervous because of the way she treated me. And, you know, it was uncomfortable – it was a very uncomfortable situation, trying to work with her and trying to go to her for any reason, you know, for work related issue.
>
> Q. Okay. Did you say anything to Ed Mansell or Carrie White that you thought it was related to your race, Pat Reudink's treatment of you?
>
> A. Yes.
>
> Q. You told that – Did you tell that to Ed Mansell?
>
> A. Yes.
>
> Q. Did you tell that to Carrie White?
>
> A. Yes.

Dkt. 21-2, at 17, deposition of plaintiff, at pp. 80-81. Mr. Mansell stated in his declaration that he was not aware that plaintiff believed that Mr. Reudink's behavior was racially motivated. Dkt. 44, at 4.

Mr. Mansell first spoke privately with Ms. Reudink and then jointly with Ms. Reudink, plaintiff, and Ms. White. During the joint meeting, plaintiff discussed her complaints about Ms. Reudink's behavior. Ms. Reudink also raised issues during the meeting, expressing frustration that she sometimes had to complete tasks that she felt could have been done by plaintiff. Mr. Mansell and Ms. White concluded that plaintiff and Ms. Reudink had a personality conflict. Ms. Mansell encouraged plaintiff and Ms. Reudink to work through their issues so that they could get along at work.

Plaintiff stated in her deposition that Ms. Reudink's hostile behavior continued, and that she informally complained to Ms. White a second time, about a year after the first complaint, that Ms. Reudink yelled at her about a work issue. Plaintiff stated that Mr. Mansell learned of the incident and met with plaintiff the next day to discuss how to resolve the ongoing tension between her and Ms. Reudink. Plaintiff stated as follows:

> A. I met with – I can't remember if Carrie was there that day, or whatever; but I know that when I came – when Ed Mansell come in, I think it was the Monday or Tuesday morning, he call me into his office and he indicated to me that he heard that I said that they disappoint – they let – they let me down.
>
> And I said to him, I say, "Yes. Because ever since I've been here, basically Pat is harassing me and I've been complaining to you" – "to you and Carrie, basically, and nothing has been done, and I'm tired of it, and I'm going to go" – I'm going to go above him and Carrie, to see if I can get this resolved.
>
> Q. And what did Ed say in response?
>
> A. Ed said to me that it's my right to do so if I want to, but I need to think about the repercussion that may happen if I went higher up. And he asked me if I wanted to be transfer from that office, and I said, "No, I don't want to transfer from that office. I feel that Pat should learn" – or – "Pat should learn how to work with me, because I am not a very difficult person to work with. Whatever it is, I don't know, but," I said, "I think Pat should learn to work with me."
>
> And, basically, you know, he said he will – he will talk to Pat and, you know, I think maybe that's when basically he advised Pat that if there if there's any – if she have any problem or anything, then she needs to talk to Carrie or him, you know, and then he will relate it or whatever.
>
> So that was the – that was the – He basically disencouraged me from going to personnel to lodge a complaint.

Dkt. 21-2, at 21-22, plaintiff's deposition at pp. 97-98.

Plaintiff stated that she did not go to human resources because she thought that "after I'd spoken to him and he indicate that he will speak to Pat or whatever, and then – you know, I just feel that probably maybe that would help." Dkt. 21-2, at 23, plaintiff's deposition at p. 102. Plaintiff stated that, after this, Ms. Reudink didn't speak to plaintiff again. Dkt. 21-2, at 23, plaintiff's deposition at p. 103.

December 2002 Layoff. In 2002, Farmers Insurance Exchange, which had been planning a nationwide reduction in its clerical force, announced that the first round of reductions among its non-supervisory clerical employees would occur at the end of the year. Each branch claims office was told the number of clerical employees that it would be allowed to retain in 2003. The Vancouver BCO office was initially told it would have to lay off three employees by December 31, 2002. Plaintiff stated that it was maybe two or three weeks after her second conversation with Mr. Mansell about Ms. Reudink that Mr. Mansell announced that clerical layoffs would occur. Dkt. 21-2, at 29, plaintiff's deposition, at p.134.

At the time the planned layoff was announced, there were six non-supervisory clerical employees remaining at the Vancouver branch claims office: Darlene Clock, Cleone Christianson, Patricia Curnes, Andrea Kangas, Ms. Reudink, and plaintiff.

Not all of the clerical employees had the same job titles or salary grades, and their job duties differed. Each job title was given a salary grade. The salary grades reflected the relative level of responsibilities and duties of the position. Ms. Christianson, Ms. Reudink, and Ms. Curnes were Claims Associates, with a salary grade of 28. As Claims Associates, these employees were assigned some claims adjusting functions. As a Customer Service Clerk, salary grade 25, plaintiff did not have claims-adjusting functions. Ms. Klock was the Vancouver branch claims office secretary, with a salary grade of 27. Finally, Ms. Kangas was a Claims Processor with a salary grade of 24.

Farmers Insurance Exchange used a matrix to determine which clerical employees would be chosen for layoff. Fifty percent of an employee's matrix scores was based on performance, as determined by the contribution levels awarded in the employee's last three performance

evaluations. Based upon the point values assigned to her contribution levels in 1999, 2000, and 2001, plaintiff received a total score of 15 points for the first part of the matrix, the performance portion. Ms. Kangas and Ms. Curnes received 15 points; Ms. Reudink received 17.5 points; Ms. Christianson received 22.5 points; and Ms. Klock received 25 points. Plaintiff does not contest the process by which this first part of the matrix was completed, nor does she challenge the result of the scores on this part of the matrix. Plaintiff's claim of racial discriminated is grounded on the scoring on the second part of the matrix.

The other fifty percent of the matrix score was based on an assessment of the employee's current skills in six areas: (1) Dependability and Time Management; (2) Verbal and Written Communication; (3) Claims Systems Skills; (4) Claims Technical Knowledge; (5) Customer Service; and (6) Multi-Tasking.

For the second part of the matrix, the current skills assessment, Ms. White rated plaintiff, Ms. Kangas, Ms. Curnes, Ms. Reudink, and Ms. Christianson, the clerical employees she supervised. Mr. Mansell rated Ms. Klock, whom he supervised. Mr. Mansell's involvement in assigning the ratings for the second part of the matrix is disputed.

On September 30, 2002, Ms. White and Mr. Mansell initially completed the current skills assessments. Plaintiff's scores on the assessment were in relevant part as follows: (1) a level 2 out of 10 for Dependability and Time Management, noting that plaintiff chose to make and receive personal phone calls instead of assisting her co-workers; (2) a level 2 out of 10 for Verbal and Written Communication, noting that plaintiff rushed through the claims explanation process and failed to give necessary information to the customer; (3) a level 3 out of 10 for Claims Systems Skills, based upon a "fair" knowledge of the systems; (4) a level 3 out of 10 for Claims Technical Knowledge, noting that plaintiff required the approval or acknowledgment of others when making decisions on claims within her authority or job description; (5) a level 4 out of 10 for Customer Service, noting that, while plaintiff had a very uplifting, friendly personality with all customers, she tended to be disturbing most of the time with a loud voice and personal calls; and (6) a level 4 out of 10 for Multi-Tasking, with the comment that plaintiff was not always able to complete the

tasks on her own desk, and was able to cover a few other desks when other clerks were out. Dkt. 39-2, at 7. None of the critical comments was reflected in plaintiff's prior performance evaluations.

At the end of the process, plaintiff had received a final rating of 9 points for this second part of the matrix; Ms. Kangas received 9.5 points; Ms. Curnes received 18 points; Ms. Reudink received 20 points; Ms. Christianson received 22 points; and Ms. Klock received 25.5 points. Ms. White and Ms. Mansell stated in their declarations that these rankings were consistent with their general impressions of the employees' relative skill sets. Dkt. 39, at 6; Dkt. 44, at 6. On October 7, 2002, Ms. White and Mr. Mansell re-did the skills assessments to conform their comments and scores to those listed in the skills matrix that were disseminated by human resources. When points were assigned based on the skills matrix, all of the point totals increased, with the exception of Ms. Klock's. At that time, Ms. Nettles received a total of 9.5 points; Ms. Kangas received 10 points; Ms. Curnes received 19 points; Ms. Reudink received 23 points; Ms. Christianson received 24 points; and Ms. Klock received 25 points.

Mr. Mansell submitted the completed October 7, 2002 matrix to human resources for review. Cheryl Sinclair, who was part of the Fail Safe committee tasked with ensuring that the matrix process was applied fairly, reviewed the Vancouver BCO matrix. Ms. Sinclair was concerned that plaintiff's and Ms. Kangas' scores were low, in light of their previous performance evaluations. Ms. Sinclair thus increased many of plaintiff's and Ms. Kangas' scores. At the time she changed plaintiff's scores, Ms. Sinclair, who is black, had no knowledge of the complaints that plaintiff had made against Ms. Reudink. On October 29, 2002, Ms. White formally incorporated those changes into new skills assessments for plaintiff and Ms. Kangas.

After Ms. White and Mr. Mansell had completed the matrix process, the Vancouver BCO was informed that it had to lay off two clerical employees during the first round of the layoffs. Under the final matrix, plaintiff and Ms. Kangas had the two lowest matrix scores. On October 31, 2002, plaintiff received a memo titled Workforce Reduction. Dkt. 44-2, at 7. The notice stated that, "[a]s a result of the decreased work in our office, your position is being eliminated and

the company currently does not have another position to offer you." *Id*. The memo also stated that "if you are unable to secure another position within the Company, your employment will be terminated at the close of business on December 31, 2002." *Id*. After plaintiff was notified of her termination, she applied for four positions with Farmers Insurance Exchange and Farmers Insurance Group. She was not hired for those positions. Ms. Kangas, who also received the Workforce Reduction memo, requested and received permission to take early retirement, effective February 1, 2003. Mr. Mansell had known of Ms. Kangas' desire to take early retirement prior to her lay-off notice on October 31, 2002.

Twenty out of 71 clerical employees in Farmers Insurance Exchange's Northwest Region were laid off on December 31, 2002; approximately 800 clerical employees were laid off nationwide that year. Of the 71 clerical employees in the Northwest Region five, including plaintiff, were minorities: three black, one Hispanic, and one Asian (as of October 31, 2002). Dkt. 29, at 4. Of these five employees, plaintiff was the only one laid off in the December 31, 2002 layoff. Farmers Insurance Exchange has continued to downsize its clerical workforce since the December 2002 layoff. Since March of 2006, Ms. Klock and Ms. Christianson have been the only two clerical claims employees at the Vancouver branch claims office.

On December 2, 2005, Ms. Nettles filed this action *pro se* in Clark County Superior Court, naming Farmers Insurance Company of Washington as the defendant. The case was removed to federal court on March 28, 2006, and counsel appeared shortly thereafter to prosecute plaintiff's claims. On June 28, 2006, plaintiff filed an amended complaint in which she substituted Farmers Insurance Exchange and Farmers Group, Inc. as defendants. In the amended complaint, plaintiff alleged that defendants (1) discriminated against her in employment based upon her race, gender, national origin and age, in violation of 42 U.S.C. § 1981 and RCW 49.60.180, and (2) retaliated against her in violation of 42 U.S.C. § 1981 and RCW 49.60.210. Dkt. 5, at 2.

MOTION FOR SUMMARY JUDGMENT

On February 28, 2007, defendants filed a motion for summary judgment, contending that (1) the claims against Farmers Group should be dismissed because Farmers Group was not Ms. Nettles' employer at the time of her termination; (2) the claims under RCW 49.60 are time barred; (3) plaintiff has failed to state an actionable claim of discrimination; (4) plaintiff has failed to state an actionable claim of retaliation; and (5) plaintiff's claim for punitive damages should be dismissed. Dkt. 20.

In her response, plaintiff stated that defendants' motion is well taken with regard to her claims of age and gender discrimination, in light of insufficient evidence to support those claims and that her claim of retaliation based on the failure to hire her after her termination is not supported by sufficient evidence. Dkt. 56, at 2. Plaintiff stated in her response that she has abandoned these claims. Therefore, the remaining claims before the court are allegations of race and national origin discrimination and retaliation in the termination of plaintiff's employment. Dkt. 56, at 3. Plaintiff contends that she has offered a prima facie case of race/national origin discrimination; that she has offered specific and substantial evidence that the reasons given for her poor evaluation and resulting layoff were pretextual; that summary judgment based upon the statute of limitations is not appropriate on plaintiff's state law claims; summary judgment in favor of Farmers Group on the question of whether that entity was plaintiff's employer would be inappropriate because there is a genuine issue of fact as to whether Farmers Group was plaintiff's employer; and plaintiff's claim for punitive damages should proceed. Dkt. 56.

In their reply, defendants maintain that plaintiff has not produced any evidence in support of a claim for discrimination or retaliation based upon her national origin, which is Jamaican; that plaintiff has produced no evidence supporting her claim that she was targeted for layoff because of her race; that plaintiff has produced no evidence of a causal link between her complaints about Ms. Reudink and her selection for layoff; that plaintiff's state law claims are time barred; that plaintiff has neither alleged nor proved a joint employer relationship; and that plaintiff's claims for punitive damages should proceed. Dkt. 59.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 .S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra)*. Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

DISCUSSION

1. Claims against Farmers Group

Defendants contend that the claims against Farmers Group should be dismissed because Farmers Insurance Exchange, not Farmers Group, was Ms. Nettles' employer from 1998 through December 31, 2002. Plaintiff argues that there is a question of fact as to whether plaintiff's employer was Farmers Group, since some of the documents relevant to this case appear to identify Farmers Group as her employer. Kathryn Trepinski, an Assistant Secretary of Farmers Insurance Exchange, stated in a declaration as follows:

> 3. FIE is a reciprocal or interinsurance exchange organized and existing under the laws of the State of California (Insurance Code §§ 1280, et seq.). FIE has its own governing body, rules and regulations, financial statements, and tax identification number.
>
> 4. Defendant Farmers Group, Inc. ("FGI"), d/b/a Farmers Underwriters Association, is the attorney-in-fact for FIE. As attorney-in-fact for FIE. FGI performs certain administrative services for FIE. FGI does not participate in the handling or processing of insurance claims.

Dkt. 51, at 2-3.

It is unclear from the record what the relationship of the defendants is to one another and to plaintiff. For example, the record contains documents, including plaintiff's termination notice (Dkt. 44-2, at 7), that are on Farmers Group letterhead. There are at least issues of fact as to which of these defendants are responsible for or liable to plaintiff for the alleged acts. Defendants' motion for summary judgment, requesting dismissal of the claims against Farmers Group should be denied without prejudice.

2. National Origin/Racial Discrimination and Retaliation under 42 U.S.C. § 1981

Plaintiff claims she was laid off/terminated based upon national origin and racial discrimination, in violation of 42 U.S.C. § 1981. She also claims defendants retaliated against her after she complained about racial harassment by laying her off, in violation of Section 1981.

National Origin/Racial Discrimination. 42 U.S.C. § 1981 provides that all persons "shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens." In a Section 1981 action, plaintiffs must show intentional discrimination on account of race. *Evans v. McKay*, 869 F.2d 1341, 1344 (9th Cir. 1989). To state a claim under Section 1981, there must be evidence of racial animus on the part of the defendants. *Evans v. McKay*, 869 F.2d 1341, 1345 (9th Cir. 1989). When a plaintiff charges an employer with racial discrimination in taking retaliatory action, a cause of action under 42 U.S.C. § 1981 has been stated. *Manatt v. Bank of America NA*, 399 F.3d 792, 799 (9th Cir. 2003).

The burden shifting test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), which applies in the Title VII employment context, also applies to employment discrimination claims brought under 42 U.S.C. § 1981. *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9th Cir. 2006). The plaintiff must first establish a *prima facie* case of discrimination consisting of the following elements: (1) plaintiff belongs to a protected class; (2) he or she was performing the job satisfactorily; and (3) he or she suffered an adverse employment action or was treated less favorably than others. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If the plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its adverse employment decisions. *Id.* Once the defendant satisfies this burden, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for a discriminatory motive. *Id.* at 804. A plaintiff may establish pretext either directly, by showing that unlawful discrimination more likely motivated the employer, or indirectly, by showing that the employer's proffered reason is unworthy of belief. *See Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir. 1996).

Retaliation. To establish a retaliation claim under Title VII, "a plaintiff must show (1) involvement in a protected activity, (2) an adverse employment action and (3) a causal link between the two." *Brooks v. City of San Mateo,* 229 F.3d 917, 928 (9th Cir. 2000) (*citing Payne v. Norwest Corp.*, 113 F.3d 1079 (9th Cir.1997)). At that point, the burden of production shifts

to the employer to present legitimate reasons for the adverse employment action. Once the employer carries this burden, plaintiff must demonstrate a genuine issue of material fact as to whether the reason advanced by the employer was a pretext. Only then does the case proceed beyond the summary judgment stage. *Id.*

Defendants concede that plaintiff can make out a *prima facie* case of race and national origin discrimination because she is black and of Jamaican descent, she met the minimum qualifications for her position as a Claims Customer Service Clerk, she was laid off, and non-black and non-Jamaican clerical employees were retained. Defendants maintain that they had a legitimate, nondiscriminatory reason for plaintiff's termination when they implemented a company wide reduction in force of clerical employees, based upon a procedure that resulted in the layoff of employees who had the lowest matrix scores, when that procedure which took into account performance and a current skills assessment. Defendants contend that plaintiff cannot demonstrate that Farmers Insurance Exchange's reason for selecting her was a pretext.

Regarding the retaliation claim, defendant maintains that plaintiff first complained about Ms. Reudink in 2001, more than a year before Mr. Mansell or Ms. White did or said anything that she perceived as retaliation; the first part of the matrix score was derived from past performance reviews that were given long before plaintiff's second conversation with Mr. Mansell; and Ms. Sinclair, who did not know of plaintiff's complaints about Ms. Reudink, determined plaintiff's final matrix score. Dkt. 20.

In her response to the motion for summary judgment, plaintiff contends that her claim for discrimination based upon race and her claim for retaliation were supported by compelling evidence. She argues as follows:

> The facts established for purposes of this motion illustrate that the reasons provided for Nettles' termination were contrived by her supervisors in the wake of a complaint of racial harassment, were false and unworthy of credence or belief, and constituted a pretext for unlawful discrimination and retaliation. Ms. Nettles had received positive evaluations of her performance at Farmers for calendar years 1998, 1999, 2000, and 2001, which were the last four periods that she was regularly evaluated. In 2001 and 2002, Ms. Nettles complained of racial harassment by a co-worker, Pat Reudink. Farmers failed to follow its own policy when her complaint was not forwarded to Human Resources for investigation. Ms. Nettles was warned in 2002 by the Vancouver Branch Manager, Ed Mansell, that any effort to pursue her complaint beyond his office would result in "repercussions" in her

> employment. Later that year, during an evaluative process to determine which clerical employees would be laid off from the Vancouver Branch, Ms. Nettles received the lowest scores of any employee evaluated. She was criticized for deficiencies and conduct that had *never* been noted in previous evaluations. She was assigned significantly lower scores than other employees evaluated in several categories of performance, even though other employees were criticized at least as harshly as Ms. Nettles in the narrative part of the evaluation. The lower numerical scores assigned to Ms. Nettles by her supervisors - which were revised after Human Resources at Farmers even noted that they were inappropriate - resulted in her layoff and termination from the company.

Dkt. 56, at 3.

Regarding plaintiff's claim for discrimination, defendants have shown that lay-offs were part of the company-wide plan to reduce clerical positions, that assigning matrix scores to employees was a legitimate nondiscriminatory process upon which to base the lay-off decision; and that laying off those employees with the lowest matrix scores was a legitimate, nondiscriminatory reason for the terminations. The record shows that plaintiff and Ms. Kangas received the two lowest scores on the skills assessment portion of the matrix; plaintiff and Ms. Kangas were the only two clerical employees who did not receive at least one score of "exceeds expectations" on their 2001 performance reviews. Ms. Curnes, who received a rating of "below expectations" in one of the categories in 1999 raised her ratings in subsequent performance reviews, and received a rating of "exceeds expectations" in one of the categories in 2001. While plaintiff's matrix scores for lay-off rankings purposes addressed issues that were not raised in performance reviews, nothing in the record shows that the matrix ratings were a pretext for a discriminatory motive. Even recognizing that the criticisms that resulted in a lower matrix score for plaintiff were not raised in her prior performance evaluations, there is nothing in the record to suggest that the matrix score was a pretext for discriminating against plaintiff *because of her race or national origin.* Plaintiff has not met her burden to show that the matrix scores Mr. Mansell, Ms. White, and ultimately Ms. Sinclair, assigned to plaintiff, and which ultimately resulted in her termination, were a pretext for discrimination on the basis of race. Plaintiff's claim based upon national origin and racial discrimination under 42 U.S.C. § 1981 should be dismissed.

The retaliation claim is a different issue. In fact, plaintiff's claim, as argued above in her response to the motion for summary judgment, and as quoted above, is in essence that she was

awarded lower matrix scores as retaliation for having complained that her co-worker was harassing her on the basis of race. There are outstanding issues of material fact as to whether the matrix score that ultimately led to plaintiff's termination was the result of retaliation for her ongoing complaints about her co-worker's treatment of her, including whether plaintiff communicated to Ms. White and Mr. Mansell that she believed that she was being harassed on the basis of race; whether Mr. Mansell made the statement about repercussions, what he meant by that statement, and what, if any, role that statement had in relation to plaintiff's matrix scores; and whether plaintiff's low matrix scores were the result of retaliation. Plaintiff has made a sufficient showing of pretext to proceed with the claim of retaliation on the basis of race. However, plaintiff has not met her burden to raise an issue of fact that she was retaliated against on the basis of her national origin, and this claim should be dismissed. Defendants' motion for summary judgment should be denied with regard to plaintiff's claim for retaliation on the basis of race, in violation of 42 U.S.C. § 1981.

4. Claims under the Washington Law Against Discrimination, Chapter 49.60 RCW

Defendants contend that plaintiff's claims under the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, should be dismissed as time-barred. Defendants maintain that plaintiff received written notice of her layoff on October 21, 2002, and she did not file this lawsuit until December 2, 2005, beyond the three year limitations for an action under RCW 49.60.

Plaintiff argues that the October 21, 2002 memo she received told her that her position was being eliminated, not her employment, and that, therefore, the cause of action did not accrue until she was terminated on December 31, 2002. She contends that this action was timely filed for purposes of the WLAD.

The WLAD, RCW 49.60 *et seq.*, prohibits discrimination with regard to the right to obtain and hold employment. RCW 49.60.180*; See* RCW 49.60.030. WLAD also prohibits employers from retaliating against employees who complain about alleged discrimination. RCW 49.60.210. While chapter 49.60 RCW does not expressly provide for a particular statute of limitations for

employment discrimination claims, courts have applied the general three-year statute of limitations in RCW 4.16.080(2) to WLAD claims. The statute of limitations for actions involving discrimination under RCW 49.60.180 is 3 years. *See Adler v. Fred Lind Manor*, 153Wn.2d 331, 355-56, citing *Nearing v. Golden State Foods Corp.*, 114 Wn.2d 817, 820 (1990) (racial discrimination); *Lewis v. Lockheed Shipbuilding & Constr. Co.*, 36 Wn.App. 607, 613 (1984) (disability and/or racial discrimination). The statute of limitations on a discrimination claim begins to run when the final decision is communicated to the employee, not when the termination becomes effective. *See Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 815-16 (1991); *Hinman v. Yakima Sch.Dist. No. 7*, 69 Wn.App.445, 449-50 (1993).

In this case, plaintiff was informed by memo on October 21, 2002 that she would be terminated if she did not find another position in the company. Dkt. 44-2, at 7. Plaintiff argues that the memo plaintiff received told her that her position was being eliminated, not that her employment was ending. That is not the case. The memo stated that, "if you are unable to secure another position within the Company, your employment will be terminated at the close of business on December 31, 2002." *Id.* The decision was communicated to plaintiff on October 21, 2002 was a final decision, and her causes of action under the WLAD accrued on that date. The case upon which plaintiff relies, *Stone v. Georgia Power Co.*, 902 F.Supp. 1578 (M.D. Ga. 1995) is factually distinguishable. The discrimination and retaliations claims under chapter 49.60 RCW should be dismissed as barred by the statute of limitations.

4. Punitive Damages

Plaintiff has requested an award of punitive damages. Defendant contends that the court should dismiss the claim for punitive damages because plaintiff has presented no evidence of discrimination or that those who participated in the employment actions at issue almost certainly knew that they were engaging in unlawful discrimination and/or retaliation; and because Farmers Insurance Exchange went to great lengths to ensure that its reduction in force was carried out in a nondiscriminatory manner.

Plaintiff contends that she was retaliated against for complaining about racial harassment by a co-worker, that she was threatened with repercussions if she chose to take her complaint to another level, and that management was aware of harassing conduct and failed to report that conduct to Human Resources.

A complaining party may recover punitive damages under 42 U.S.C. § 1981 against a respondent "if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).

Defendants contend that punitive damages should not be available in this case because Farmers Insurance Exchange made a good faith effort to carry out the lay-off process in a nondiscriminatory manner, citing *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999) (employer may have a good faith defense, enabling it to escape punitive damages if it can show that the challenged actions were not taken by senior managers and were contrary to the employer's good faith implementation of an effective anti-discrimination policy). There are issues of fact that preclude summary judgment at this point on whether punitive damages are available, including the type of authority and the amount of discretion that the decision makers had in what was done. *See Id*. at 543. There are also outstanding issues of act related to whether defendants acted with malice or with reckless indifference to plaintiff's federally protected rights. Defendants' motion for summary judgment on the claim for punitive damages should be denied.

ORDER

Therefore, it is hereby

ORDERED that Defendant's Motion for Summary Judgment (Dkt.20) is **GRANTED IN PART AND DENIED IN PART**, as follows: (1) Plaintiff's claim for racial discrimination under 42 U.S.C. § 1981 is **DISMISSED WITH PREJUDICE**; (2) Plaintiff's claim for retaliation on the basis of national origin is **DISMISSED WITH PREJUDICE**; (3) Plaintiff's claim for retaliation on the basis of her complaints about racial harassment/discrimination under 42 U.S.C. § 1981 may proceed; (4) Plaintiff's claims under the Washington Law Against Discrimination, chapter 49.60

RCW are **DISMISSED WITH PREJUDICE**; (5) Plaintiff's claim for punitive damages may proceed; and (6) plaintiff's claims related to age and gender discrimination, and plaintiff's claims based upon defendants' failure to hire her after her termination have been abandoned and are accordingly **DISMISSED WITH PREJUDICE**.

The Clerk of the Court is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 26th day of March, 2007.

Robert J. Bryan
United States District Judge